IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77— 1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION—THIRD DEPARTMENT

JURISDICTIONAL STATEMENT

LAUMAN MARTIN, ESQ.
NIAGARA MOHAWK POWER CORPORATION
300 Erie Boulevard West
Syracuse, New York 13202

HALCYON G. SKINNER, ANDREW GANSBERG
and MICHAEL A. ELLENBERG,
LEBOEUF, LAMB, LEIBY & MACRAE,
140 Broadway,
New York, New York 10005

Attorneys for Appellant,
NIAGARA MOHAWK POWER CORPORATION

April 12, 1978

TABLE OF CONTENTS

Table of Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION—THIRD DEPARTMENT

JURISDICTIONAL STATEMENT

Niagara Mohawk Power Corporation ("Niagara Mohawk", "Appellant" or "the Company") appeals from a judgment and decision of the Supreme Court of the State of New York, Appellate Division—Third Department ("Appellate Division"), entered on September 12, 1977, upholding certain orders of the Public Service Commission of the State of New York ("the Commission"). Appellant submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

Opinion Below

The opinion of the Appellate Division is reported at 59 App. Div. 2d 73, 397 N.Y.S.2d 210 (1977). The order of the Appellate Division, entered October 26, 1977, denying Niagara Mohawk's motion for reargument or, in the alternative, for leave to appeal to the New York State Court of Appeals ("Court of Appeals"), and the order of the Court of Appeals, entered January 17, 1978, denying Niagara Mohawk's motion for leave to appeal, are not reported. Copies of the Appellate Division's decision, the order of the Appellate Division and the order of the Court of Appeals are included in the Appendix at pp. 6a-10a, 2a-3a, and 1a respectively.

Jurisdiction

This appeal is brought to review a decision of the Appellate Division which confirmed orders of the Commission, dated November 16, 1976 and December 30, 1976, fixing rates of Niagara Mohawk for electric and gas service. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) to review a final judgment entered on September 12, 1977 by the Appellate Division. The Appellate Division is the highest court of the State of New York in which a decision could be had.* The validity of certain statutes of the State of New York (Commission orders issued November 16, 1976 and December 30, 1976)** was drawn

---

* The decision of the Appellate Division was a "final judgment" of the "highest court" of the State of New York in which a decision could be had and a "decision" in favor of the validity of the statutes drawn in question: *American Motorists Ins. Co.* v. *Starnes,* 425 U.S. 637, 642 (1976); *Atchison, Topeka & Santa Fe Ry.* v. *Public Util. Comm'n,* 346 U.S. 346, 349 (1953); and *Napa Valley Electric Co.* v. *Railroad Comm'n,* 251 U.S. 366, 372-373 (1920).

**The Commission's orders are "statutes" within the purview of 28 U.S.C. §1257(2): *Atchison, Topeka & Santa Fe Ry.* v. *Public Util. Comm'n, supra* at 348; *Bluefield Water Works & Improvement Co.,* v. *Public Serv. Comm'n,* 262 U.S. 679, 683 (1923); *Lake Erie & Western R.R.* v. *State Pub. Util. Comm'n,* 249 U.S. 422, 424 (1919); and *Grand Trunk Western Ry.* v. *Railroad Comm'n,* 221 U.S. 400, 403.

into question in the Appellate Division on the ground of their being repugnant to the Constitution of the United States. The decision of the Appellate Division entered on September 12, 1977 was in favor of the statutes' validity.

The instant appeal is timely taken. The 90-day period for docketing commenced on January 17, 1978 when Appellant's motion for leave to appeal was denied by the Court of Appeals. No appeal could be taken prior to that date because the judgment of the Appellate Division was susceptible of being reviewed and reversed until the Court of Appeals had acted. See *American Motorists Ins. Co.* v. *Starnes, supra* at 642; *Market Street Railway* v. *Railroad Commission,* 324 U.S. 548, 552 (1945); and *Andrews* v. *Virginia Ry.,* 248 U.S. 272, 275 (1919).

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

Questions Presented

I. Did the Commission's refusal to permit Niagara Mohawk to earn a return on that portion of its property consisting of tax refunds constitute confiscation and deprivation of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

II. Was Niagara Mohawk denied due process of law when the Appellate Division explicitly rejected the sole basis for the Commission's action and confirmed the action on an alternative rationale not articulated by the Commission?

Statement

Niagara Mohawk is a privately owned public utility corporation serving customers in 37 counties of the State of New York with gas and electricity. The rates which Niag-

ara Mohawk charges its customers, and the terms and conditions of service affecting those customers, are regulated by the Public Service Commission of the State of New York under the provisions of the New York State Public Service Law and the Regulations of the Commission thereunder.

In 1974 and 1975 the Company received federal income tax refunds as the result of its retroactive adoption of minimum guideline lives for computing income tax depreciation in the years 1966-68. In an earlier proceeding, the Commission considered these income tax refunds and ordered the Company to flow them through directly to ratepayers. The Company challenged this order and its position was sustained on judicial review. *Niagara Mohawk Power Corp.* v. *Public Service Commission,* 54 App. Div. 2d 255, 388 N.Y.S.2d 157 (1976). The Appellate Division there held that the Commission's action constituted impermissible retroactive ratemaking and was without statutory authority. However, in concluding its opinion the Appellate Division, in dicta, invited the Commission to consider the refunds "when a future rate adjustment is requested." 54 App. Div. 2d at 257, 388 N.Y.S.2d at 159.

Six days after the Appellate Division's decision was issued, the Commission, in granting an increase in gas and electric rates, isolated for separate treatment the same income tax refunds and treated them as customer-contributed capital with a zero cost. The effect of this treatment was to deprive the Company of an opportunity to earn a return on its property by the amount of said refunds. The Commission further required the same treatment of certain real property tax refunds for the years 1971-74. The dollar impact of the Commission's action was to reduce the Company's rate base by more than $13 million and its permissible annual revenues by approximately $2.5 million. The only ground invoked by the Commission to support its determination was:

> this money was originally paid by customers for an expense that the company ultimately did not incur.*

By petition dated March 14, 1977, Niagara Mohawk sought to annul the Commission's orders pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). The basis for the petition was that the Commission's orders were "arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses." By order dated April 11, 1977, the proceeding was transferred to the Appellate Division from the Supreme Court, Albany County, pursuant to section 7804(g) of the CPLR.**

The Appellate Division confirmed the Commission's orders on August 4, 1977 but explicitly rejected the basis articulated by the Commission in support of its determination. The Appellate Division, in rejecting the Commission's conclusion that the tax refunds represented money paid by customers for an expense not incurred, stated:

> The conclusion of the respondent [Commission] fails to recognize that the consumer never paid the expense in the first place.***

The Appellate Division confirmed the Commission's orders on the basis of a rationale that the Commission did not articulate or consider in any fashion; that is, that in some undesignated rate case in the past it was the express intention of certain unspecified parties that these tax refunds were to be an expense paid dollar for dollar

---

* *N.Y. Public Serv. Comm'n,* Opinion No. 76-23, November 16, 1976, p. 14.

** That section provides for transfer to the Appellate Division where an administrative determination is challenged, *inter alia,* on the ground that it is not supported by substantial evidence.

*** 59 App. Div. 2d at 74, 397 N.Y.S.2d at 211.

by the customers and, therefore, any excess of estimated over actual expense could properly be considered customer-contributed capital. There is no support for this substituted rationale either in fact or in ratemaking theory.

After issuance of the adverse decision the Company moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals. That motion was denied and the Company then moved for leave to appeal to the Court of Appeals. That motion was also denied.

The Questions are Substantial

I.

The Commission's Order Depriving the Company of an Opportunity to Earn a Return on More Than $13 Million of its Property is Confiscatory and Deprives the Company of its Property in Violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The issue presented in this case is not whether the return allowed a utility by a regulatory agency is so low as to constitute confiscation but whether the refusal to allow any return whatever on a substantial portion of the Company's property is confiscatory. As this Court stated in *Bluefield Water Works & Improvement Co.* v. *Public Serv. Comm'n,* 262 U.S. 679, 690 (1923), the rule that

> [r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and . . . deprives the public utility company of its property in violation of the Fourteenth Amendment . . . is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

It follows that denial of the opportunity to earn *any* return is *per se* confiscatory.

In this case, decided November 16, 1976, the Commission labeled as customer-contributed capital some $13 million of the Company's assets, subtracted that amount from rate base and thereby deprived the Company of about $2.5 million in annual revenues. The amounts so treated were tax refunds received by the Company principally from the retroactive application of guideline lives to federal income taxes paid in the years 1966-68.

The sole reason advanced by the Commission to justify its labeling of these tax refunds as customer-contributed capital was that "this money was originally paid by customers for an expense that the company ultimately did not incur."* That is, when customers paid their bills in 1966-68 they purportedly paid more for the Company's income taxes than was warranted in the light of subsequent receipt by the Company of tax refunds.

The Commission's rationale is riddled with errors:

1. The Commission's basic position, that the Company's customers "paid . . . for an expense" is directly contrary to this Court's holding in *Board of Pub. Utility Commissioners* v. *New York Telephone Co.,* 271 U.S. 23, 32 (1926), that

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company.

The Appellate Division apparently agreed with this Court and rejected the Commission's sole rationale, stating that the "conclusion of the respondent [Commission] fails to recognize that the consumer never paid the expense in the first place."

2. The Commission's attempt to compensate the Company's customers in the future, for an alleged overpayment in the years 1966-68, is a classic example of retroactive

*Opinion 76-23, *supra* at 14.

ratemaking and violates the holding of this Court in *Board of Pub. Utility Commissioners* v. *New York Telephone Co.* that

> [p]rofits of the past cannot be used to sustain confiscatory rates for the future. *Id.* at 32.

What the Commission, with the Appellate Division's approval, has done is to fix rates for the future based upon an alleged overestimate of a single item of expense [taxes] occurring some ten years ago. Since taxes are no different from any other expense, this case stands for the proposition that a regulatory agency may isolate any estimated expense and compare it with the expense ultimately incurred and, by labeling the difference "customer-contributed capital," reduce rates for the future as a means of compensating customers for an alleged overcharge.

3. Even if it were assumed *arguendo* that retroactive ratemaking is permissible and that future rates could be adjusted to offset past excesses, there is no evidence whatever that the Company at any time in the years in question earned an excessive return or that the Company's customers paid more than a just and reasonable rate. In fact, at no time for more than ten years has the Company earned even its allowed return.

II.

The Company's Right to Due Process of Law was Violated When the Appellate Division Confirmed the Commission's Rate Orders on the Basis of a Rationale Not Articulated by the Commission.

The Appellate Division denied Appellant due process of law when, after rejecting the sole rationale advanced by the Commission in support of its decision, it attempted to preserve the Commission's decision on a novel theory not

articulated by the Commission. In so doing, the Appellate Division violated this Court's holding that a reviewing court must judge agency action solely on the grounds invoked by the agency. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 396-397 (1974).

As this Court stated in *SEC* v. *Chenery Corp.*, *supra* at 196:

> If those [agency] grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Procedural due process requires the opportunity to challenge the evidence and the theory that purportedly support an agency determination. See *Goldberg* v. *Kelly*, 397 U.S. 254, 269-271 (1970). The Appellate Division's confirmation of the Commission's orders on an alternative rationale, not articulated by the Commission, deprived the Company of the constitutional guarantee of due process. The arguments advanced before the Appellate Division were and could only have been directed to the rationale upon which the Commission relied. The affirmance of the Commission's orders on a substituted rationale denied the Company the opportunity to demonstrate that the alternative rationale formulated by the Appellate Division was not supported by any evidence adduced in the proceeding before the Commission and was without any sound basis in regulatory practice. The instant case is a classic example of the judiciary, in an effort to avoid involvement with an area of administrative responsibility, transgressing the very policy to which it seeks to adhere, that is, not involving itself in an area clearly within the peculiar expertise of the

agency. The result is to "propel the court [judiciary] into the domain . . . set aside exclusively for the administrative agency." *SEC* v. *Chenery, supra* at 196. This Court should reaffirm the *Chenery* rule and clarify the role of the judiciary by reversing the decision of the Appellate Division.

Conclusion

The decision of the Appellate Division is, we believe, the only judicial statement in the State of New York concerning the proper ratemaking treatment of tax refunds and indeed may well be the only judicial holding on this subject in any jurisdiction.

As we have indicated, the decisions of the Commission and the Appellate Division are erroneous throughout: they are confiscatory, they are built upon the misconception that the customers pay for specific expenses, they mislabel tax refunds as customer-contributed capital, they constitute retroactive ratemaking and they have no support in the record or in legal precedent. In addition, the Appellate Division by substituting its own rationale for that of the Commission violated the rule set forth in *SEC* v. *Chenery*.

Unfortunately, the decisions below cannot be dismissed as merely wrongly decided cases without precedential value. Tax refunds are continuing phenomena involving substantial sums of money and the question of treatment of tax expense is an important part of every rate case. Clearly the only judicial holding on the subject will be of continuing and widespread importance.

While the treatment of tax refunds below constitutes an open invitation to confiscation—a matter of sufficiently broad concern to require consideration by this Court—the implications flowing from the decisions in this case are even more serious. If the correctness of expenses used in fixing past rates is to be subject to continuing re-examination in the light of subsequent developments, the rate

stability presently provided by the rule against retroactive ratemaking and by the filed rate doctrine will be destroyed and replaced by chaotic uncertainty. The matter is of great public importance and requires plenary consideration by this Court.

Respectfully submitted,

LAUMAN MARTIN, ESQ.
NIAGARA MOHAWK POWER CORPORATION
300 Erie Boulevard West
Syracuse, New York 13202

HALCYON G. SKINNER, ANDREW GANSBERG
and MICHAEL A. ELLENBERG,
LEBOEUF, LAMB, LEIBY & MACRAE,
140 Broadway,
New York, New York 10005

Attorneys for Appellant,
NIAGARA MOHAWK POWER CORPORATION

April 12, 1978

APPENDIX

STATE OF NEW YORK

COURT OF APPEALS

(Index No. 2724-77)
Mo. No. 1127

In the Matter of

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

For a Judgment &c.

vs.

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Respondent.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

DATED AND ENTERED: January 17, 1978.

STATE OF NEW YORK

At a Motion Term of the the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 12th day of September, 1977:

Present: Hon. Louis M. Greenblott, *Justice Presiding,*
Hon. T. Paul Kane,
Hon. Robert G. Main,
Hon. Ann T. Mikoll,
Hon. J. Clarence Herlihy, *Associate Justices.*

County Clerk's Index No. 2724-77

In the Matter of the Application of

Niagara Mohawk Power Corporation,
Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

The Public Service Commission of the State of New York,
Respondent.

A motion having been made by petitioner, Niagara Mohawk Power Corporation at this term of court in the above-entitled proceeding for an order granting reargument, or in the alternative, permission for leave to appeal to the Court of Appeals now, after reading and filing proof of due service of the notice of motion, the affidavit of Halcyon

G. Skinner, Esq., in support of the motion and respondent Public Service Commission having appeared in opposition thereto, and the Court having rendered a decision on the 14th day of October, 1977, it is hereby

Ordered that, petitioner's motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals is denied, without costs.

Enter:

/s/ John J. O'Brien
Clerk

Dated and Entered: October 26, 1977

A True Copy:

John J. O'Brien
Clerk

STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, commencing on the 20th day of June, 1977:

Present: Hon. Louis M. Greenblott, *Justice Presiding,*
Hon. T. Paul Kane,
Hon. Robert G. Main,
Hon. Ann T. Mikoll,
Hon. J. Clarence Herlihy, *Associate Justices.*

In the Matter of the Application of

Niagara Mohawk Power Corporation,
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

The Public Service Commission of the State of New York,
Respondent.

The above-named petitioner having instituted this proceeding in Supreme Court, Albany County, pursuant to article 78 of the Civil Practice Law and Rules, to review determinations of respondent Public Service Commission, dated November 16, 1976 and December 30, 1976 and said proceeding having been transferred for disposition to the Appellate Division, Third Department, by order of the Supreme Court, Albany County, dated April 11, 1977 and entered in Albany County, and having been presented during the above-stated term of this court and having been

argued by Halcyon G. Skinner, attorney for petitioner, and Howard J. Read, attorney for respondent, and, after due deliberation the Court having rendered a decision on the 4th day of August, 1977 it is hereby

Ordered that the determinations of respondent Public Service Commission of the State of New York, under review herein, be and the same hereby is confirmed, and the petition dismissed with costs.

Enter:

/s/ John J. O'Brien
Clerk

Dated and Entered: September 12, 1977.

A True Copy:

John J. O'Brien
Clerk

STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, the following opinion, per Herlihy, J., was rendered on August 4, 1977:

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of NIAGARA MOHAWK
Petitioner,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

Argued, June 21, 1977.

Before: Hon. LOUIS M. GREENBLOTT, *Justice Presiding,*
Hon. T. PAUL KANE,
Hon. ROBERT G. MAIN,
Hon. ANN T. MIKOLL,
Hon. J. CLARENCE HERLIHY, *Associate Justices.*

PROCEEDING pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review determinations by respondent dated November 16, 1974 and

December 30, 1974 which excluded certain tax refunds from petitioner's rate base when calculating consumer rates for electric and gas service.

LAUMAN MARTIN (Halcyon G. Skinner of Le Boeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York 10005, of counsel), for petitioner, 300 Erie Boulevard West, Syracuse, New York 13202.

PETER H. SCHIFF, for respondent, Public Service Commission, Empire State Plaza, Albany, New York 12223.

OPINION FOR CONFIRMANCE

HERLIHY, J.

In rate proceedings commenced in 1974 the respondent authorized an annual rate increase, but in so doing it noted that the petitioner would be receiving Federal tax refunds by utilizing a retroactive application of depreciation standards for the years 1966-1969. The petitioner did receive a refund of about $16.4 million and upon notification, the respondent ordered the petitioner to "flow through" a major portion thereof to its customers. That order was reviewed in an article 78 proceeding and a judgment of Special Term annulling the order was affirmed by this court upon the theory that the respondent was exceeding its powers by attempting to fix rates retrospectively instead of prospectively (*Matter of Niagara Mohawk Power Corp.* v. *Public Serv. Comm. of State of N.Y.*, 54 A D 2d 255). In considering the prior attempt to order a "flow through" or retroactive rate adjustment, this court observed that "the proper approach for the Commission is to consider this acquired money when a future rate adjustment is

requested. Such a procedure would fully protect the ratepayer from any unjust and unreasonable rates" (*id.* at 257).

In one of the orders now at issue herein, the respondent has considered the above-mentioned Federal tax refund received by the petitioner in the context of a new rate case initiated by proposed rate increases filed by the petitioner on December 19, 1975. In that order the respondent concluded that the windfall refund was in the nature of a contribution to capital by the customers of petitioner since it was a payment made upon rates which envisioned an expense which was not incurred or paid. As a result of its classification as capital contributed by customers, the petitioner cannot claim such money as an investment upon which it is entitled to receive a return (income) via future rates.

Considering the fact that rates approved by the respondent as an agent of the State are intended to permit the continuation of a monopolistic service, the question of what actually constitutes assets eligible for a profit or fair return on investment requires a form of expertise that is generally the precise area with which the respondent is entrusted. The balancing of the interests of the State and private enterprise is not a matter which may be exercised *de novo* by this court. Accordingly, the appropriate test to be applied in reviewing the singular determination of the respondent that the recovery of sums representing expenses which were previously included in a rate as expenses represent customer contributed capital, is whether or not it has a "sound basis in reason" giving due consideration to the facts. (See *Matter of Pell* v. *Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 N Y 2d 222, 231.)

The conclusion of the respondent fails to recognize that the consumer never paid the expense in the first place. The "expense" of taxes was at all times merely hypothetical

because rates are prospective only (*Matter of Niagara Mohawk Power Corp.* v. *Public Serv. Comm. of State of N.Y., supra*). The rate is comprised of hypothetical expenses based in some instances on past actual expenses. The petitioner in its brief seems to contend that the tax refunds are earnings; however, it is readily apparent that they are not in any sense money earned by the utilization of borrowed or ownership capital in the utility business. The funds are not the result of good management (savings by efficiency) or the result of services rendered to the customers. Since the income has no direct relationship to past investment in the company and does represent an amount expressly intended to be paid dollar for dollar in the rate as an operating expense (see Comment, Utility Rates, Consumers and the New York State Public Service Commission, 39 Albany L. Rev. 707, 720) the recovery thereof is not "earnings".

Based upon the foregoing considerations, the overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis. While the concept that it is a return of expenses actually paid by consumers is not persuasive, the notion that the money represents items intended by both parties to have been paid dollar for dollar by consumers and not from the ordinary employment of investment funds reasonably flows from the respondent's decisions.

The petitioner does not contest the concept that consumer contributed capital should not be included in the assets forming the rate base and it has not established that the respondent was arbitrary in assigning that classification to the assets at issue herein. The further contention of the petitioner that excluding the assets (income) from the rate base is the equivalent of recouping past overpayments is without any sound basis. The respondent is not now directing any "flow through" of refunds or recouped

past expenses, but is simply excluding them as items upon which the stockholders (company) are entitled to receive a fair rate of return as invested capital.

If it be assumed that the respondent adopted the dictum in this court's prior decision (*Matter of Niagara Mohawk Power Corp.* v. *Public Serv. Comm. of State of N.Y., supra,* p. 257), there is on the present record no showing that the respondent's determinations were irrational or that there was no sound basis in reason for its determinations.

While the petitioner cites numerous decisions, it is significant that there is no authority which determines that the tax refund here involved must or even should be considered part of the capital investment of the petitioner.

The determinations should be confirmed, and the petitions dismissed, with costs.

ORDER 2724-77

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

In the Matter of the Application of

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

For a Judgment Pursuant to
ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES,

against

THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

The above named petitioner having applied to this Court by petition verified the 14th day of March, 1977 for a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling the determinations, opinions and orders of the respondent Public Service Commission issued November 16, 1976 and December 30, 1976 in its Cases numbered 26943 and 26944 and 26945 relating to the disposition of refunds received by petitioner of federal income taxes and real property taxes and for further relief as set forth in the petition, and due notice having been given to the respondent Public Service Commission of the State of New York and said respondent having served and filed its answer to said petition, verified April 4, 1977 and this matter having come on to be heard before this Court,

Now upon reading and filing said petition and answer and it appearing that the petitioner herein has raised questions under subdivisions 4, and other subdivisions of Section 7803 of the Civil Practice Law and Rules, and on

motion of respondent Public Service Commission of the State of New York, it is

ORDERED that the above-entitled proceeding be and the same hereby is transferred for disposition to a term of the Appellate Division held in and for the Third Judicial Department in accordance with Section 7804(g) of the Civil Practice Law and Rules.

ENTER,

/s/ ROBERT C. WILLIAMS

Signed:
Albany, New York
April 11, 1977

County Clerk's Index No.:
2724/1977

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of
NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

for a Judgment under Article 78 of the Civil Practice Law and Rules

against

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

Notice is hereby given that Niagara Mohawk Power Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, Appellate Division, Third Department entered in this proceeding on September 12, 1977.

This appeal is taken pursuant to Title 28 United States Code, Section 1257, subparagraph (2).

Dated: April 4, 1978

LAUMAN MARTIN, ESQ.

NIAGARA MOHAWK POWER CORPORATION
300 Erie Boulevard West
Syracuse, New York 13202
(315) 474-1511

LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005
(212) 269-1100

By /s/ .....
Halcyon G. Skinner
Attorneys for
NIAGARA MOHAWK POWER CORPORATION

To:

PETER H. SCHIFF, ESQ.
General Counsel

Public Service Commission
of the State of New York
Empire State Plaza
Albany, New York 12223

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Capitol Building
Albany, New York 12224